Supreme Court, U.S.
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No.

In the Supreme Court of the United States

IN RE GRAND JURY SUBPOENA: UNDER SEAL,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, a corporate employee, made statements to counsel in the course of an internal corporate investigation. The United States Court of Appeals for the Fourth Circuit held that Petitioner was not entitled to assert attorney-client privilege with respect to the communications based on the conclusion that a subjective belief that Petitioner was being represented by counsel was not objectively reasonable. The petition presents the following question:

Whether the Fourth Circuit erroneously rejected Petitioner's claim of privilege by adopting a legal standard that resolved ambiguities concerning the formation of an attorney-client relationship in favor of the attorney, in conflict with the legal standards employed by the Seventh and Tenth Circuits.

PARTIES TO THE PROCEEDING

The parties include the following:

1. Petitioner [redacted], former [redacted] of America Online/Time Warner (identified by "John Doe 1" in the opinion of the Fourth Circuit sought to be reviewed);

2. [Redacted], former [redacted] of America Online/Time Warner (identified by "John Doe 2" in the opinion of the Fourth Circuit sought to be reviewed);

3. Kent Wakeford, former Executive Director of Business Affairs of America On-Line/Time Warner; and

4. Respondent United States of America.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 7

I. THE FOURTH CIRCUIT RESOLVED AMBIGUITIES IN THE FORMATION OF THE ATTORNEY-CLIENT RELATIONSHIP IN FAVOR OF THE LAWYER IN CONFLICT WITH LEGAL STANDARDS EMPLOYED IN THE SEVENTH AND TENTH CIRCUITS 10

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES

Barton v. United States Dist. Ct. for the Cent. Dist. of Cal.,
410 F.3d 1104 (9th Cir. 2005) 12, 14

Church of Scientology v. United States,
506 U.S. 9 (1992) 7

Fisher v. United States,
425 U.S. 391 (1976) 8

Hunt v. Blackburn,
128 U.S. 464 (1888) 8, 19

In re Auclair,
961 F.2d 65 (5th Cir. 1992) 13, 15

In re Bevill, Bresler & Schulman Asset Management Corp.,
805 F.2d 120 (3d Cir. 1986) 9

In re Grand Jury Proceedings,
156 F.3d 1038 (10th Cir. 1998) 9, 16

In re Grand Jury Subpoena,
274 F.3d 563 (1st Cir. 2001) 9

In re Von Bulow,
82 F.2d 94 (2d Cir. 1987) 19

Trammel v. United States,
445 U.S. 40 (1980) 8

TABLE OF AUTHORITIES (Cont'd)

Page(s)

United States v. International Bhd. of Teamsters,
119 F.3d 210 (2d Cir. 1997) 9

United States v. Jones,
696 F.2d 1069 (4th Cir. 1982) 4

United States v. Keplinger,
776 F.2d 678 (7th Cir. 1985) 11

United States v. Nelson,
38 M.J. 710 (A.C.M.R. 1993) 12

United States v. Zolin,
491 U.S. 554 (1989) 8

Upjohn Co. v. United States,
449 U.S. 383 (1981) 1, 2, 8

Westinghouse Elec. Corp. v. Kerr-McGee Corp.,
580 F.2d 1311 (7th Cir. 1978) 10, 12

Wylie v. Marley Co.,
891 F.2d 1463 (10th Cir. 1989) 12

OTHER AUTHORITY

MODEL RULES OF PROFESSIONAL CONDUCT
Rule 1.1 (2003) 1

MODEL RULES OF PROFESSIONAL CONDUCT
Rule 1.3 (2003) 1

MODEL RULES OF PROFESSIONAL CONDUCT
Rule 1.6 (2003) 1

TABLE OF AUTHORITIES (Cont'd)

Page(s)

MODEL RULES OF PROFESSIONAL CONDUCT
Rule 1.7 (2003) 1

MODEL RULES OF PROFESSIONAL CONDUCT
Rule 1.9 (2003) 1

MODEL RULES OF PROFESSIONAL CONDUCT
Rule 1.13 (2003) 1

MODEL RULES OF PROFESSIONAL CONDUCT
Rule 1.16 (2003) 1

MODEL RULES OF PROFESSIONAL CONDUCT
Rule 1.18 (2003) 1, 15

R. WISE, LEGAL ETHICS (1970) 284 10

RESTATEMENT (THIRD) OF THE LAW,
THE LAW GOVERNING LAWYERS §131 (2000) 14

VA. SUP. CT. R., PT. 6, §II,
VIRGINIA RULES OF PROFESSIONAL CONDUCT
Rule 1.1 (2005) 15

VA. SUP. CT. R., PT. 6, §II,
VIRGINIA RULES OF PROFESSIONAL CONDUCT
Rule 1.3 (2005) 14

VA. SUP. CT. R., PT. 6, §II,
VIRGINIA RULES OF PROFESSIONAL CONDUCT
Rule 1.6 (2005) 14, 21

VA. SUP. CT. R., PT. 6, §II,
VIRGINIA RULES OF PROFESSIONAL CONDUCT
Rule 1.7 (2005) 14

TABLE OF AUTHORITIES (Cont'd)

Page(s)

VA. SUP. CT. R., PT. 6, §II,
VIRGINIA RULES OF PROFESSIONAL CONDUCT
Rule 1.9 (2005) 14

VA. SUP. CT. R., PT. 6, §II,
VIRGINIA RULES OF PROFESSIONAL CONDUCT
Rule 1.13 (2005) 15, 17, 19, 20

VA. SUP. CT. R., PT. 6, §II,
VIRGINIA RULES OF PROFESSIONAL CONDUCT
Rule 1.16 (2005) 15

OPINIONS BELOW

The Fourth Circuit's opinion (Pet. App. 1a-12a) is reported at 415 F.3d 333. The district court's opinion (Pet. App. 17a-30a) is not officially reported.

JURISDICTION

The Fourth Circuit consolidated for disposition the separate appeals of Petitioner and two other AOL executives on June 28, 2005 and then affirmed the district court's decision in one opinion on July 18, 2005. Pet. App.1a-12a. The Fourth Circuit denied a petition for rehearing filed by one of the appellants on August 18, 2005. *Id.* at 13a-15a. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix (Pet. App. 52a-105a) reproduces the text of the Rules of the Supreme Court of Virginia, Virginia Rules of Professional Conduct 1.1, 1.3, 1.6, 1.7, 1.9, 1.13, 1.16 and the American Bar Association Model Rules of Professional Conduct 1.1, 1.3, 1.6, 1.7, 1.9, 1.13, 1.16, 1.18.

STATEMENT OF THE CASE

This case arises out of a grand jury subpoena issued to America On-Line/Time Warner ("AOL") requesting production of certain handwritten notes and memoranda prepared by counsel in the course of an internal investigation AOL voluntarily undertook in 2001. Pet. App. 1a-4a. The notes and memoranda memorialize communications made to counsel by "five current or former employees" of AOL in individual meetings with those attorneys. *Id.* 18a. AOL agreed to waive its attorney-client privilege over those communications, which attached pursuant to this Court's precedent in *Upjohn Co. v. United*

States, 449 U.S. 383, 389 (1981), and to produce the subpoenaed documents. Three of those employees, including Petitioner, moved to quash the subpoena on the grounds that the documents demanded were protected from disclosure by their individual attorney-client privilege. *Id.* at 4a. Petitioner asserted that a personal privilege attached when Counsel expressly offered to represent him and committed to advise him if a conflict of interest arose. *Id.* at 2a-5a.

The district court denied the motion to quash, finding Petitioner was not yet a "client[]" of counsel and therefore had no privilege. Pet. App. 21a. The United States Court of Appeals for the Fourth Circuit affirmed, holding that Petitioner's failure to establish an "objectively reasonable mutual understanding" that counsel "were representing" him prevented any personal privilege from attaching. Pet. App. 5a-6a. In arriving at this conclusion, the Fourth Circuit adopted a standard for determining whether an attorney-client relationship had been formed that resolved ambiguities in favor of the attorney in conflict with legal standards applied in the Seventh and Tenth Circuits and in conflict with a lawyer's ethical duties.

Factual Background

In 2001, AOL hired attorneys from the law firm of Wilmer, Cutler & Pickering ("Wilmer") to assist in-house counsel (collectively "counsel") in an investigation of AOL's relationship with a company called PurchasePro. Pet. App. 1a. AOL was evaluating potential liability for securities fraud based upon its accounting restatement of certain advertising and commercial revenues. *Id.* 50a-51a. In the course of the internal investigation, counsel met with certain employees of AOL, including Petitioner.

At the beginning of those meetings, counsel recited to the majority of employees the typical *Upjohn* warnings, stating that Counsel represented AOL, not the individual

employees, and that the attorney-client privilege belonged to AOL. Pet. App. 31a-32a. Counsel made different representations to five employees, including Petitioner. It is undisputed that counsel made the following representations to Petitioner in the course of his first interview with counsel concerning the PurchasePro matter. Counsel advised Petitioner that "we represent the company," and that the "attorney-client privilege belongs to AOL and AOL can decide whether to keep it or waive it." *Id.* 35a-38a. At the same time, however, counsel told Petitioner that "we can also represent you until such time as there appears to be a conflict of interest" and that "we will advise you at the time that a conflict appears."[1] *Id.* Based upon these representations, Petitioner communicated in confidence with counsel. At no time did counsel advise Petitioner of any conflict. Moreover, it is undisputed that Petitioner asked whether he should retain separate counsel and was told that counsel "didn't recommend" that he do so. *Id.* Petitioner communicated in confidence with Counsel three more times. Based on these facts, the courts below assumed, without deciding, that Petitioner subjectively believed that counsel was jointly representing him and AOL at the time of his four interviews with counsel. Pet. App. 9a, 27a.

Proceedings in the District Court

1. On February 26, 2004, a grand jury in the United States District Court for the Eastern District of Virginia issued a subpoena *duces tecum* to AOL relating to its investigation of AOL's relationship with PurchasePro. Pet. App. 33a-34a. The subpoena demanded production of counsel's written notes and memoranda reflecting communications made between counsel and the five AOL executives, including Petitioner, during these meetings.

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[1] Counsel made similar statements to John Doe 2 and Wakeford and never advised them of any conflict. Pet. App. 2a-3a.

AOL chose to waive the company's privilege with respect to those communications. Petitioner, John Doe 2 and Wakeford ("Intervenors") moved to intervene and to quash the subpoena, asserting their individual attorney-client privilege to prevent disclosure of their communications. *Id.* at 18a-19a.

Intervenors, the government, and AOL submitted documents to the district court setting forth counsel's statements to Intervenors before each communicated in confidence with Counsel. Those statements are not in dispute. Pet. App. 35a-49a.

2. The district court denied the motion to quash, holding that no individual attorney-client privilege exists because Intervenors failed to establish that "they were the 'clients' of the attorneys that conducted investigative interviews." Pet. App. 18a.

First, the district court rested its decision on the first element of the traditional criteria governing assertions of privilege: whether "the asserted holder of the privilege is or sought to become a client."[2] Pet. App. 24a-2[illegible]. The district court reasoned that counsel's statement "we can represent you" is legally distinct from "we do or we will represent you" because "we can represent you is not a statement of actual representation, but rather the potential for representation." *Id.* at 28a. It concluded that the attorney-

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[2] Under the classic test employed in the Fourth Circuit, the privilege applies when "(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (0b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." Pet. App. 7a (citing *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982)).